

THE HISTORY OF REVENUE SHARING IN CALIFORNIA

1998-Proposition 5

In November, 1998, the people of California overwhelmingly passed Proposition 5: The Tribal Government Gaming and Economic Self-Sufficiency Act. The Act incorporated into the state Government Code an entire gaming compact, and required the Governor, as a ministerial duty, to enter into a compact with any tribe who made a request.

The compact created a non-gaming tribal assistance fund, and required each gaming tribe to deposit two percent of its net win from its gaming terminals each calendar quarter. The trust fund was to be distributed to federally recognized tribes for “education, economic development, cultural preservation, health care, and other tribal purposes.”

On August 29, 1999, the majority of Proposition 5 was struck down by the California Supreme Court. Therefore, this revenue sharing provision of Proposition 5 was never implemented.

1999-Tribal State Compacts

Prior to the striking down of Proposition 5, former Governor Gray Davis commenced negotiations for the terms of a model tribal-state compact. When negotiations commenced in April, 1999, the tribes and state agreed to incorporate the concept of revenue sharing with non-gaming tribes within the compact. On September 10, 1999, the California Legislature ratified tribal-state compacts executed between Governor Davis and sixty-one tribes. In addition to authorizing the play of Class III gaming, tribes and the State promised to provide all non-gaming tribes and tribes operating less than three hundred fifty (350) Class III gaming devices \$1.1 million annually from the Revenue Sharing Trust Fund (“RSTF”).¹

The RSTF was to be funded from payments made by tribes who wished to acquire a license in order to obtain the right to operate Gaming Devices in excess of what was authorized pursuant to the compacts.² Tribes who wished to purchase licenses were required to pay a \$1,250 “one-time, non-refundable, pre-payment license fee” into the RSTF in order to draw a license from the state-wide pool. Once drawn, in order to maintain the license to operate the Gaming Device, tribes were required to make quarterly payments into the RSTF. The license for any machine was to be cancelled if the Gaming Device authorized by the license is not in commercial operation within twelve months of the issuance of the license. A tribe who was more than two calendar quarters in arrears in its contributions to the RSTF was not permitted to conduct any gaming activities.

¹ Tribes entitled to receive these payments were defined as “Non-Compact Tribes.”

² Section 4.3.1 of the 1999 compacts authorized tribes to operate either the number of Class III Gaming Devices they had in operation on September 1, 1999 or 350 Gaming Devices, whichever was greater. If tribes wanted to operate additional Gaming Devices, they were required to purchase a license for each additional Gaming Device, not to exceed 2,000.

2000-Proposition 1A

The validity of the compacts was conditioned upon voter approval of a constitutional amendment to permit the Class III gaming authorized by the compacts. Proposition 1A, the California Indian Self-Reliance Amendment, was approved by sixty-five percent of California voters on March 7, 2000. Throughout the campaign, established gaming tribes³ highlighted through numerous ads how they intended to share their revenue with other tribes. Many non-gaming tribes agreed to support Proposition 1A in part because of the promise of revenue sharing from the gaming tribes. Exit polls indicated one of the primary reasons for the public support of Indian gaming was the concept of revenue sharing contained within the model tribal-state compacts.

2002-The California Gambling Control Commission's Methodology Report

As soon as Proposition 1A was passed and tribes began to move forward to commence gaming, the revenue sharing concepts within the tribal-state compacts and Proposition 1A were undermined by the California Gambling Control Commission ("CGCC"). Several months of discussion ensued between tribes and the CGCC as to how the payment methodology for licensed devices should be "interpreted." Although non-gaming tribes were invited to attend the three public meetings held by the CGCC to discuss this matter, none had the resources available to retain attorneys, submit written comments, or meet in private with members of the CGCC to argue in support of an interpretation that would provide for adequate payments into the RSTF. Many non-gaming tribes operated under the erroneous assumption that, because the compacts identified the CGCC as the "trustee" of the RSTF, any actions taken by the CGCC would reflect their fiduciary responsibility to the RSTF, and in turn its beneficiaries.

On May 29, 2002, the CGCC released its methodology report, identifying the manner in which payments were to be made into the RSTF in order for a tribe to obtain the right to a Gaming Device license. Even though the stated purpose of the licensing section of the compacts was to generate revenue for Non-Compact Tribes, the CGCC interpreted the licensing provisions as exempting a tribe from having to pay any license fees for the first 350 licensed devices.⁴ This resulted in an annual reduction of \$32 million in the RSTF.

The CGCC also interpreted the \$1,250 one-time, non-refundable, pre-payment license fee as fully refundable by treating the fee as a credit towards future fees. This resulted in a reduction of approximately \$40 million RSTF payments, reducing a tribe's obligation to make future payments, in many cases for several years after they had been in commercial operation.

In addition to treating the \$1,250 one-time, non-refundable, pre-payment license fee as a credit towards future fees, the Commission offered tribes the benefit of a full refund of the \$1,250 license fee if they choose to return the licenses they had drawn the previous

³ Only tribes who made a \$1 million contribution to the campaign were permitted to participate. Because non-gaming tribes did not have the resources to make such a contribution, they were unable to participate in the campaign.

⁴ This exemption was in addition to the first 350 Gaming Devices a tribe was authorized to operate within a license. Thus, tribes were able to operate 700 Gaming Devices without making payments into the RSTF.

year back into the pool. The compact did not authorize such a refund. In fact, the compact expressly stated licenses for any gaming device shall be canceled if the gaming device authorized by the licenses is not in commercial operation within twelve months of issuance of the license. The Commission provided five tribes the benefit of a refund of the \$1,250 license fee, allowing 2,610 licenses to be returned to the pool, eliminating \$3,262,500 from the RSTF by way of refunds to five tribes who drew licenses but failed to place their machines in commercial operation within twelve months of the date the license was drawn.

The result of the CGCC's implementation of the above methodology resulted in a \$31 million annual reduction of fees paid into the RSTF. Based upon the number of eligible recipient tribes (currently 71 Non-Compact Tribes), each Non-Compact Tribe receives approximately \$453,333 annually from direct payments made to the RSTF: over \$650,000 short of the \$1.1 million promised in the compacts.

2003-Assembly Bill 673

In 2003, the California Legislature was made aware the annual balance of the RSTF was insufficient to fulfill the promised \$1.1 million to each eligible tribe. In recognition of this deficiency, AB 673 was overwhelmingly supported by all tribes and unanimously passed and signed by former Governor Davis, authorizing a supplement, or "backfill", of the RSTF shortfall from the 1999 Compacts' Special Distribution Fund ("SDF"). AB673 made backfilling of the RSTF shortfall from the SDF the priority use of the SDF. With 71 tribes eligible for the RSTF payments, \$78.1 million was required annually to pay each eligible tribe the promised \$1.1 million. In 2003 and 2004, the Legislature appropriated \$54 and \$45 million respectively from the SDF in accordance with AB673.

2005-Assembly Bill 1750

AB673 improved matters greatly by guaranteeing each Non-Compact Tribe would receive payment from the SDF at the end of each fiscal year for any shortfall that existed in the RSTF payments received the previous fiscal year. However, because recipient tribes had to wait until the end of each fiscal year to receive the backfill from the SDF, they had difficulty engaging in any constructive use of their RSTF payments. In addition, recipient tribes were uncertain as to when they would receive their quarterly RSTF payments, since the CGCC was under no legal obligation to make payments within a specific period of time.

In 2005, the California Legislature corrected these remaining problems with the unanimous passage of AB1750, signed into law by Governor Schwarzenegger on October 7, 2005. AB1750 provided for the projected RSTF shortfall to be transferred from the SDF to the RSTF at the beginning of the fiscal year, rather than the end. This allowed the RSTF shortfall to be backfilled each fiscal quarter rather than at the end of the fiscal year. AB1750 also requires the CGCC to issue the RSTF quarterly payment within forty-five (45) days of the end of each fiscal quarter. Therefore, each eligible recipient tribe receives \$275,000 within forty-five days of the end of each fiscal quarter.

These changes has provided recipient tribes with the financial certainty necessary to leverage their RSTF payments for essential tribal government services, such as medical, dental, education and to promote economic development.

2004-Present- Schwarzenegger Compacts

Upon assuming office, Governor Schwarzenegger focused upon negotiating tribal-state compacts that provided for increased payments by tribes in order to conduct gaming. However, the new and renegotiated compacts have directed the majority of the payments made by tribes to be deposited into the state's general fund. Many compacts greatly reduce the amount they will be required to pay to the RSTF. Other compacts appear to provide RSTF payments comparable to those required under the 1999 compacts, but contain revenue "triggers" so that payments will be made only if the casino generates a certain amount of revenue. At least one tribe whose compact contains such a trigger has acknowledged they do not anticipate reaching this revenue threshold, thus their obligation to make RSTF payments has been eliminated. Other compacts eliminate the need for RSTF payments for several years, and when payments commenced, they will be greatly reduced from what they would have been obligated to make pursuant to the 1999 compacts.

This problem is compounded by the fact that none of the compacts negotiated since 2004 provide for payments to the SDF. Because of the tremendous shortfall of payments made into the RSTF, the SDF is the primary funding source for revenue sharing. Should tribes continue to negotiate new compacts or renegotiate their 1999 compacts and eliminate SDF payments, it will become difficult, if not impossible, to fulfill the promise of future revenue sharing.

2006-07 Tribal-State Compacts

In the summer of 2006, the Agua Caliente Band of Cahuilla Indians, Pechanga Band of Luiseno Indians, San Manuel Band of Serrano Indians, Morongo Band of Mission Indians and Sycuan Band of Kumeyaay Indians announced amendments to their 1999 tribal-state compacts. Although each compact increased the tribes' direct payments into the RSTF, the elimination of payments to the SDF was estimated to be \$92 million annually.⁵ Because the SDF is the primary funding source for the RSTF, it was anticipated the SDF would be operating at a deficit by fiscal year 2010-11.⁶

In order to protect the RSTF, all of these compacts, except for the Agua Caliente Band, included language which directs the State Gaming Agency to direct a portion of the revenue each tribe contributes to the general fund to the RSTF if there is an insufficient amount available in the SDF to satisfy the ongoing RSTF shortfall. However, as addressed below, questions have arisen as to whether it is sufficient to have this directive solely within these four compacts.

After the five compacts were ratified by the California Legislature, in March, 2008, they were subject to a referenda vote by the people of California. Opponents to the compacts

⁵ California State Auditor's Report, July 2007, "Indian Gaming Special Distribution Fund", page 40.

⁶ Id., page 41.

argued the language within these compacts regarding providing general fund payments to the RSTF was not sufficient: that a statute needed to be passed in order to assure money would be appropriated from the general fund into the RSTF.

2007-08-Senate Bill 62

In 2007, Senator Dean Florez introduced Senate Bill 62, which amends Government Code Section 12012.90 to provide a statutory mechanism to ensure that in the event there are insufficient funds in the SDF to backfill future RSTF shortfalls, general fund payments made by tribes pursuant to new or renegotiated compacts shall be made available to backfill any future RSTF shortfalls. According to the Senate Appropriations Committee analysis, the bill will not result in any new costs, as Non-Compact tribes will continue to receive funds already guaranteed to them

SB62 was passed unanimously by the Senate Governmental Organization and Appropriations Committees, as well as the Senate on 5/17/07. It is currently scheduled for a hearing before the Assembly Governmental Organization Committee on Wednesday, June 25, 2008.